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No. 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

RAYMOND P. GALLAGHER, Chief of Police of the City of Springfield, Massachusetts, et al., *Appellants,*

v.

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., ET AL., *Appellees.*

On Appeal from the United States District Court for the District of Massachusetts

BRIEF FOR THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, AMICUS CURIAE

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BRIEF FOR THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, AMICUS CURIAE

STATEMENT

This brief amicus curiae is filed upon leave granted by both parties in letters, copies, of which have been filed with the Clerk. It is filed because of the vital interest of the Seventh-day Adventist denomination in the Sunday law question. As the largest Christian denomination in the nation observant of the Saturday Sabbath, the denomination and its members have long

suffered under the adverse effects, direct and indirect, religious, social, and economic, of Sunday closing laws in most of the states.

The Seventh-day Adventist denomination now numbers more than 330,000 adult members throughout the United States. Despite the difficulties and burdens imposed by Sunday laws, it has grown substantially in the 97 years since its organization when there were 3,500 members.

I. THE DENOMINATION OPPOSES SUNDAY LAWS.

Historically, the Seventh-day Adventist denomination has avoided litigation and contentions for and on behalf of its organization and members.

Its members are counseled that the duty to obey the laws of the state and nation includes obedience to Sunday closing laws, even though economic hardship may result. Members are instructed that rather than offend their Christian neighbors who believe in and observe Sunday as a sacred day, they should refrain even from such activities as mowing their lawns, doing the family washing, and other outdoor domestic work on Sunday. They are adjured not to conduct a business, or pursue secular employment which might be offensive to those who are worshiping in the immediate vicinity but rather to spend that time in missionary activities which are proper and acceptable on all days of the week.

By their forbearance, however, neither the denomination nor its members recognizes Sunday as a sacred day. On the contrary, they staunchly adhere to their position that Sunday laws are by their very nature, wording, motive, history, and enforcement, religious laws and thus unconstitutional.

Recitations in the preambles to Sunday laws and decisions of the courts proclaiming Sunday laws to be necessary for the health, welfare, and economy cannot change the embedded concept of the people that Sunday is thus observed, not from any considerations of health, but from religious conviction. Religious tradition of a majority of Christian churches attaches religious significance to the day and is the occasion for enactments such as those here involved. These basic actualities cannot be occluded by unreal claims of other purpose.

Irrebuttable evidence of the religious nature of the Sunday laws is found in their terminology. Verbiage such as "Lord's Day," "Sabbath Day," Christian Sabbath," "worldly employment," "secular business," "holy time," "Sabbath observance," "Sabbath breaking," "profanation of Lord's Day," "violate the Sabbath," and many other such words and phrases clearly indicate that religious inducements prompted the various legislators in framing and passing these laws.[1]

Aside from the transparency of the language in which these laws are framed, the position that such laws are religious laws is fortified by the manner in which these religiously worded statutes have been interpreted by the courts.

Before the Sunday law opponents successfully pointed out the unconstitutionality of legislation directed to observance of Sunday as a sacred religious day, many sagacious observations were made by judges in various states wherein Sunday law issues were being litigated.

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[1] See Appendix A, *infra*, p. 45.

Chief Justice Kent of New York said, "*The statute for preventing immorality* consecrates the first day of the week as holy time." *People* v. *Ruggles*, 8 Johns. 291. In the case of *Pearce* v. *Atwood*, 13 Mass. 324, 346, the Massachusetts court gave as the reason for setting aside the day as "holy" the fact that "the legislative power, or the uniform usage of every Christian state has exacted the observance of it as such." The courts of Iowa, Arkansas, Pennsylvania, and many others declare, that Sunday is "sacred."[2]

Therefore, though the Seventh-day Adventist denomination, as above set forth, does not encourage its members directly to challenge Sunday legislation, its declared policy as an organization and through its individual members is to remonstrate against Sunday legislation, and by all legitimate means to oppose every enactment that serves, in effect, to establish Sunday as a state-supported religious day.

II. SEVENTH-DAY ADVENTISTS HAVE A SPECIAL INTEREST IN SUNDAY LEGISLATION

The Seventh-day Adventist denomination shares with other Christian denominations many of the basic doctrines of the Christian religion and, in addition thereto, maintains doctrines peculiarly and intimately related to the issue which now is before this Honorable Court.

We appreciate, of course, that "the law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson* v. *Jones*, 13 Wall. 679, 728. And, so far as this Court is concerned,

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[2] *Davis* v. *Fish*, 1 Greene 406, 412. *Johnston* v. *The Commonwealth*, 22 Pa. St. 102; *Stockden* v. *The State*, 18 Ark. 186.

the truth or error of our religious beliefs is not relevant and not a subject for adjudication. *Davis* v. *Beason,* 133 U.S. 333, 342; *United States* v. *Ballard,* 322 U.S. 78, 87. Nevertheless, appreciation by the Court of the deep concern of the Seventh-day Adventist denomination with the constitutionality of the Massachusetts Sunday Law justifies a brief resume of its beliefs relative to such laws.

A. Belief in the Seventh-Day Sabbath

As indicated by its name, the Seventh-day Adventist denomination adheres to the belief that the Bible teaches that the seventh day is the Sabbath. Their belief is based primarily on the wording of the fourth commandment of the Ten Commandments:

> "Remember the sabbath day, to keep it holy. Six days shalt thou labour, and do all thy work; but the seventh day is the sabbath of the Lord thy God: in it thou shall not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant, nor thy cattle, nor thy stranger that is within thy gates: for in six days the Lord made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore the Lord blessed the sabbath day, and hallowed it."

They believe that the seventh day is the only day that God has ordained and sanctified as a holy day. This doctrine is taught throughout both the Old and the New Testament.[3]

The Scriptural authority for the sanctity of the Seventh-day Sabbath and the lack of Scriptural authority for the change of the Sabbath are recognized

[3] Genesis 2:2, 3; Exodus 16:4, 26, 29; Exodus 20:8-11; Matthew 24:20; Luke 4:16; 23:52-56; 24:1.

by many Christians of both Catholic and Protestant faiths, as well as by the Jews.[4]

B. Challenge to Unauthorized Attempt to Change Day

The Seventh-day Adventist denomination was founded by a group of people intensely interested in Bible prophecies. In the Holy Scriptures they discovered evidence that indicated a wrongful attempt would be made to transfer the sanctity of the Seventh-day Sabbath to some other day. Certain passages of Scripture refer to an unauthorized attempt on the part of some power, contrary to the Commandment of God, to "change the times and the laws."[5] They believe that the "times" referred to is the weekly time of worship, or the Seventh-day Sabbath as defined in the Bible, and that the "laws" referred to are the Ten Commandments which are eternal, and which, among other things, enjoin all men to observe the Seventh-day Sabbath.[6]

The denomination believes that God has never authorized any person or body politic or ecclesiastical power to make such a change; that any person, church, or state which endeavors so to do is usurping God's power and authority.[7]

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[4] See Appendix B, *infra*, p. 46.

[5] Daniel 7:25 (Revised Standard Version). See Appendix C, *infra*, p. 47.

[6] Uriah Smith, *The Prophecies of Daniel and the Revelation*, rev. ed. (Pacific Press Publishing Association, Mountain View, Calif., 1944) pp. 105, 147; Ellen G. White, *The Great Controversy* (Pacific Press Publishing Association, Mountain View, Calif., 1950) pp. 443-450; *Bible Readings for the Home* (Review and Herald Publishing Association, Washington, D.C., 1958) pp. 357-367; 405-411; 432-441.

[7] Mark 7:7, 8; Matthew 15:3, 9; Matthew 5:17, 18; Isaiah 58:12-14; 2 Thessalonians 2:3-11; Daniel 7:25; Matthew 22:21.

Motivation for such unauthorized change has varied from time to time with people, places, and the immediate circumstances. In some instances, the early Christians celebrated Sunday in commemoration of the resurrection of Christ. Others were motivated by prejudice against the Jews and a determination to avoid all forms and ceremonies connected in any way with Judaism. Constantine's imperial edict for observance of Sunday was a mere adoption of the pagan day of worship in the hope thus to eliminate the divisive strain on the Empire occasioned by discordant religions.[8]

Gradually, over a period of centuries, the enforcement of civil Sunday legislation tended to promote Sunday observance throughout Christendom while at the same time increasing neglect of, and disregard for, observance of the Seventh-day Sabbath. As a conse-

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[8] See Philip Schaff, *History of the Christian Church* (Chas. Scribner's Sons, New York, 1916), vol. 3, c. 7, p. 380.
J. Westbury-Jones, *Roman and Christian Imperialism* (MacMillan and Co., Ltd., London, 1939), p. 210.
A. P. Stanley, *History of the Eastern Church* (Chas. Scribner's Sons, New York, 1884), p. 184.
Eusebius, Pamphili, *The Life of Constantine* in *Nicene and Post-Nicene Fathers*, book 2, c. 65, (Christian Literature Company, New York City, 1899-1900) p. 516.

"The festival of Sunday, like all other festivals, was always only a human ordinance, and it was far from the intentions of the apostles to establish a Divine command in this respect, far from them, and from the early apostolic church, to transfer the laws of the Sabbath to Sunday. Perhaps, at the end of the second century a false application of this kind had begun to take place; for men appeal, by that time to have considered labouring on Sunday as a sin." Neander, *History of the Christian Religion and Church*, tr. by Henry John Rose (James M. Campbell & Co., Philadelphia, 1843), p. 186.

quence, Sunday keeping became almost universal.[9] Inasmuch as the Roman Church was foremost in fostering and sanctioning civil Sunday legislation, responsible Roman Catholic spokesmen regard continuing acceptance of this change in days, even by most of the Protestant denominations, as both proof and acknowledgement of the authority of that church to command in regard to observance of holy days.[10]

III. REAL ISSUE IS A QUESTION OF AUTHORITY— —NOT JUST WHICH DAY

While which day the civil laws will enforce upon the citizens of the several states of the United States of America as a day to cease from their ordinary secular vocations is important to both Seventh-day Adventists and Jews, the Seventh-day Adventist denomination sees a more basic question in the Sunday law issue: Does any man or ecclesiastical authority have the right to change a divinely ordained law, thus setting himself up in the place of God?[11] The question to them becomes not merely which one of two twenty-four hour periods should they observe, but to whom do they owe allegiance: to God, who said, "Remember the Sabbath day [the seventh day of the week] to keep it

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[9] Vincent J. Kelly, *Forbidden Sunday and Feast-Day Occupations* (Catholic University of America Press, Washington, D. C., 1943), p. 1[illegible]

Lyman Coleman, *Ancient Christianity Exemplified*, c. 26, sec. 2 (Lippincott, Grambo & Co., Philadelphia, 1852).

James Augustus Hessey, *Sunday*, 4th ed. (Pott Young & Company, New York, 1880).

Peter Heylyn, *The History of the Sabbath*, 2d ed. rev. (Henry Seile, London, 1636).

[10] See Appendix D, *infra*, p. 48.

[11] 2 Thessalonians 2:3-4.

holy," or to men, who have said, "Remember the first day of the week to keep it holy"?

There is a conflict. Jews, Seventh-day Adventists, Seventh Day Baptists and others claim that God established the seventh day as the Sabbath by blessing it and hallowing it and by enshrining it in the heart of the great moral law, the Ten Commandments.

The Roman Catholic Church claims that by its vested authority it has transferred the solemnity of the seventh day to the first day. Unquestionably a great majority of Protestants also believe that Sunday is sacred.

Seventh-day Adventists believe that the final struggle for supremacy between the spiritual forces which now are in conflict will be waged over this question of authority.[12]

Whether the first day of the week or the seventh is the Sabbath is a religious question over which the state has no jurisdiction.

By Sunday law legislation the States lend their prestige and authority to those church interests that seek to impose Sunday observance upon the Christian world. Affirmance here of validity of such laws would strengthen the advocates of Sunday observance and materially increase the threat of such laws with increasingly stringent provisions and enforcement clauses, and revive the intolerance of Puritan days.

The Seventh-day Adventist denomination does not ask the Court to settle the question of which day is commanded by God to be kept; for, as has been noted, "The law knows no heresy, and is committed to the

[12] See Appendix E, *infra*, p. 49.

support of no dogma, the establishment of no sect." We insist only that the civil power is required to abstain from attempting to settle this religious question. We ask that the civil power recognize that two spheres of influence exist—that of God and that of the state. This basic principle of separation of church and state is comprehended in the words of Christ: "Render therefore unto Caesar the things that are Caesar's and unto God the things that are God's.[13] This basic principle requires for adherence to its philosophy that there be no interlocking of church and state by law or administration of law.

The civil government has the power and authority to protect the civil rights of men, their property, their life and their liberty, but in so doing it must not invade the jurisdiction of the spiritual, the right to believe or not to believe, the right to worship or not to worship. "Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." (Virginia "Declaration of Rights." Art. 16)

Each person should be left free to choose without influence of any degree from the state. The state should withhold its influence, either for or against any religious dispute. It cannot take sides for or against any religious organization or belief.

In maintaining the total and complete neutrality of the state as between religions, it is submitted that this Court must be vigilant to assert the unconstitutionality of any law which in the smallest degree tends to restrain the free exercise of religion.

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[13] Matthew 22:21.

> "* * * If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and, growing, break down the foundation of liberty. (*Thomas* v. *Collins*, 323 U.S. 516)

It is because of these basic beliefs that the Seventh-day Adventist denomination has obtained from the parties permission to file this brief and respectfully solicits your consideration of the following legal arguments.

ARGUMENT

I. The Massachusetts and Pennsylvania Sunday Laws Are Invalid Because They Impose Restriction on Sunday Labor and Commercial Activity as a Religious Obligation.

The first Sunday law (Constantine's decree of March, 321 A.D.) was religious in character, based on the pagan conception that made religion a part of the state.[14] The English Reformation produced the statute which is the direct forebearer of many that taday are found in the statutes of the several states (29 Car. II, c. 7 (1676)). See *Rodman* v. *Robinson*, 134 N.C. 503, 511 (1904); *Commonwealth* v. *Hoover*, 25 Pa. Super. Ct. 133, 134.

Marked similarity is apparent, from even a casual reading of most of the laws in the colonies and many state courts early explicitly recognized that Sunday laws support, foster, and protect the Sunday-observing Christian religions.[15]

The briefs of the respondent in the instant case, and of the appellant in *Braunfeld* v. *Gibbons*, No. 67 O.T. 1960, make clear that even in the period of statehood, Sunday laws have been retained and enforced as a religious measure though judicially justified as health measures to insure one day's rest in seven. The spirit and purpose of the Sunday laws being to support and aid the Sunday-observing Christian religions, they violate the "establishment of religion" clause of the First Amendment.

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[14] R. L. Odom, Sunday in Roman Paganism (Review and Herald Publishing Association, Washington, D. C., 1944) pp. 173-192. Johnson and Yost, Separation of Church and State (University of Minnesota Press, 1948) pp. 219-220.

[15] Blakely, American State Papers on Freedom of Religion (3d ed., 1943), pp. 24-30, 33-36, 38-47. Johnson and Yost, *supra*, note 14, at pp. 223-231.

II. The Sunday Laws of Massachusetts and Pennsylvania Are Invalid Because They Impose a Severe Economic Hardship and Missionary Handicap on Those Whose Religions Designate a Day Other Than Sunday for Religious Worship.

Even if it be held that the Court may disregard the fact that observance of Sunday as a religious institution is the plain motive and purpose of the laws in question, the Sunday laws as applied here are nevertheless invalid because of their intrinsic purpose and effect in discouraging free exercise of religion by sects that observe the Saturday Sabbath.[16]

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

In *Davis* v. *Beason*, 133 U.S. 333, this Court stated (p. 342):

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[16] Prior decisions of this Court are not controlling.—For two reasons, the decisions of this Court in *Hennington* v. *Georgia*, 163 U.S. 299 (1896), and in *Petit* v *Minnesota*, 177 U.S. 164 (1900) have neither controlling nor persuasive effect as precedents.

In the *Hennington* case, the challenge to the Georgia statute prohibiting the running of trains on Sunday relied solely on the interstate commerce clause. Whether the law was an establishment of religion was only of collateral interest in considering the reasonableness of the state action under the police power.

In the *Petit* case only the equal protection clause of the Fourteenth Amendment was invoked in attacking the discriminatory feature of the Sunday closing law which, by proviso specifically stated that keeping open a barber shop was not within the exempted works of necessity or charity.

In any event, these cases were decided long before this Court expressly recognized that the fundamental concept of liberty protected by the Fourteenth Amendment embraces in full degree the freedom of religion guaranteed by the First Amendment. *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940).

> ". . . The first amendment . . . was intended to allow every one . . . to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and *to exhibit his sentiments in such form of worship as he may think proper*, not injurious to the *equal rights* of others, . . ." [Emphasis supplied]

In *Cantwell* v. *Connecticut*, 310 U.S. 296, the court stated (p. 303):

> "Thus the Amendment embraces two concepts, —freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."

Even the Inquisition could reach only profession or manifestation of belief. The emphasis of the First Amendment, then, on "free exercise" of religion was on the freedom to act because the law is concerned only with external behaviour. Indeed, the received definition of religion is "The service and adoration of God or a god as *expressed in forms of worship*, in obedience to divine commands, esp. as found in accepted sacred writings or as declared by recognized teachers and in the pursuit of a way of life regarded as incumbent on individual believers; . . ." Webster, Unabridged Dictionary, (2d ed.) [Emphasis supplied]

A. *The Sunday laws impose a choice of economic loss or abandonment of religious scruple.*—By prohibiting labor and prohibiting sales of goods, the Sunday laws subject to a grave economic disadvantage and severe financial pressure the individual who also closes his business or ceases labor on another day because of his religious convictions.

Despite the basic policy of the Seventh-day Adventist denomination, many of its members, constrained by economic need, have at different times sought to labor or open their shops on Sunday. Most recently, a member, one Lester Gail, who conducted a 24-hour launderette in Malden, Massachusetts, attempted to equal the 144-hour week of a competitor by opening after sundown on Saturday and on Sunday. On complaint filed by his competitor, his case was finally dismissed by the judge who noted that he had personally observed that a barroom next door and a grocery nearby were open on the prior Sunday. Under subsequent repeated threats of the chief of police he, nevertheless, remains closed on Sunday.

In Reading, Pennsylvania, the bicycle shop of Franklin Hummel, always closed on Saturday Sabbath, has, since December 11, 1959, been closed under the Sunday law with resultant loss of $10,000 in gross sales. He now must remove to a more tolerant jurisdiction or abandon his religious beliefs in observance of Saturday as the Sabbath. In September of this year a Little Rock, Arkansas, Sunday ordinance closed the electrical appliance shop of Doyle Davis although it was also always closed on Saturday. He is now forced to sell his business.

These are but current examples of the discouragements for many years effectively imposed on our members by Sunday laws such as those here involved. They could be multiplied many times. Obviously the Saturday Sabbatarian shop-keeper or mechanic is confronted with the choice of continuing to suffer this economic hardship or disregard his religious scruples. Practice of one's religion and worship of God on a day other than Sunday, no matter how devout and sincere the

belief that it is the day appointed by God for such worship, becomes, under the Sunday law, not free, but possible only by continued submission to what is in effect a special and discriminatory exaction—the sacrifice of one-sixth of the income the worshiper might otherwise enjoy. This is clearly, and most callously, stated in the recent rejection of a Jew's defense to a criminal charge for selling carpeting on Sunday. *State of New Jersey* v. *Fass*, 162 A. 2d 608 (Hudson County Ct. 1960). The court said (p. 609):

> "The defendant maintains that he is under a competitive disadvantage with respect to his business rivals because his store is closed by reason of conscience on Saturday and legal sanctions on Sunday. He contends that his economic loss is so severe that he will be required either to yield his means of livelihood or compromise his religious convictions.
>
> "It seems to me, however, that when a person embraces the obligations of a religious sect, he is faced with the necessity of assuming the financial burdens which that choice entails. The 'free' exercise of religion does not logically carry with it the proposition that the members of a sect shall not be called upon to make some financial sacrifice in its behalf. 'Free' as used in the Federal and State Constitutions is not synonymous with 'at no cost.' It signifies here rather an absence of government restriction or interference."

In other words, the Jew who chooses to adhere to the faith of his fathers may do so only by assuming a special economic burden peculiar to that religion and the religions of others who worship God on days other than Sunday.

But this Court has said: "Freedom of speech, freedom of the press, freedom of religion are available to

all, not merely to those who can pay their own way." *Murdock* v. *Pennsylvania*, 319 U.S. 105, 111. And "Freedom of religion is not merely reserved for those with a long purse." *Follett* v. *McCormick*, 321 U.S. 573, 576.

B. *In proselyting activities, the Sunday laws prefer the Sunday-observing religions the majority by freeing them of competition with the demands of commercial and other interests.*—Evangelist activity in spreading the word of God and seeking adherents to the doctrines of a particular denomination has long been recognized as an integral part of the "free exercise of religion" protected by the First Amendment. *Murdock* v. *Pennsylvania*, 319 U.S. 105, 108-109. The preference given by the Sunday laws to those Christian religions that worship God on Sunday has heavy discouraging impact on Saturday-observing religions because of the economic pressures that obviously will be imposed upon the potential convert. These include probable loss of one-sixth of his income if he maintains a business or is otherwise independently engaged. If he is an employee, he runs the risk, not only of possible discharge from his particular employment but, in some States, of disqualification for unemployment compensation because he refuses to take employment that interferes with observance of the Saturday Sabbath. Ala. A, AA-90-17, BSSUI (1/18/54); Mass. A, AA-90-21, BSSUI (12/20/54), (US. Dep't. of Labor). On the other hand, the "orthodox" Christian sects are favored by the compelled leisure imposed by the Sunday laws. The result is a severe and continuous discrimination in missionary work against all religions that observe Saturday or Friday as the day of worship.

In *Judefind v. State of Maryland*, 78 Md. 510 the Court conceded (p. 515):

> "It is undoubtedly true that rest from secular employment on Sunday does have a tendency to foster and encourage the Christian religions—of all sects and denominations that observe that day—as rest from work and ordinary occupation enables many to engage in public worship who probably would not otherwise do so."

It is submitted that there can be no serious question that individual members of the Saturday-observing religions are subjected by the Sunday laws to serious and continuing prejudicial pressures and discouragement in the exercise of their religious freedom, both in worshipping on the day they believe appointed by God, and in seeking new adherents to their faiths.

C. ***By restricting recreational opportunities on Sundays the laws of many States subject the Saturday Sabbatarian to discouragements of practice of his religion.***—Even though a Jew or Seventh-day Adventist labors or conducts his business only five days a week in competition with others who do the same, he nevertheless is deprived of equal right to the recreational activities opportunity for which is now one of the asserted justifications for Sunday laws. Because enforced religious observance of Sunday is the paramount objective of the Sunday laws of many States, they contain provisions like that of Alabama (Code (1958) tit. 14, sec. 421) or of South Carolina (Code of Laws (1952) sec. 64-1):

> "No public sports or pastimes, such as bear-baiting, bull-baiting, football playing, horse-racing, interludes or common plays, or other games, exercises, sports or pastimes, such as hunting, shooting, chasing game or fishing, shall be used on Sunday by any person whatsoever."

This includes motion pictures (*Greenville Enterprise, Inc.* v. *Jennings*, 210 S.C. 163; *Carolina Amusement Co.* v. *Martin*, 115 S.E.2d 273 (S.C. 1960)) and professional baseball (*Greenville Baseball, Inc.* v. *Bearden*, 200 S.C. 363).

Thus, if one practices his religion by worshipping God on Saturday, he must forego on Sunday the recreational activities that Sunday observers may enjoy on Saturdays. The resultant discouragement to Saturday Sabbatarians is indirect but real. No Court can turn off the cumulative effect of these discouragements as inconsequential.

III. Free Exercise of Religion Is Protected Against Attacks Which, Though Indirect, Have Throttling Results Equal to Those of Frontal Assaults.

Adverse state court decisions, when they deal with the point at all, sustain the discrimination against the Saturday Sabbatarian with the suggestion that the Sunday law does not compel him to close on Saturday and, if he nevertheless chooses to do so, his resultant loss is not occasioned by state action, but merely his religious convictions. Appellant makes the same argument (Appellant's Br. in No. 11, p. 54). But the absence of direct action by the State to restrict free exercise of religion by the plaintiffs in these cases does not so simply end the inquiry into the effect of the legislation. As stated in *Schneider* v. *State*, 308 U.S. 147, 161, "In every case, therefore, where legislative abrigment of the [fundamental personal] rights is asserted, the courts should be astute to examine the effect of the challenged legislation." For, as noted in *American Communications Assn.* v. *Douds*, 339 U.S. 382, 399; "It is not often in this country that we now

meet with direct and candid efforts to stop" exercise of First Amendment rights.

In the domain of these basic liberties, the decisions of this Court recognize that invalid abridgment of such rights, even though unintended, and not direct may inevitably follow from varied forms of governmental action. *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 461. Religious freedom, like the others of the First Amendment, is protected, not only from heavy-handed frontal attack, but also from being stifled by more subtle governmental interference. *Bates* v. *Little Rock,* 361 U.S. 516, 523. This Court has specifically recognized that—

> "Under some conditions, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions, or taxes." (*American Communications Assn.* v. *Douds,* 339 U. S. 382, 402.)

Even if the legislation on its face, be regarded as directed to otherwise constitutional objectives, it nevertheless abridges and curtails the rights of the nonconforming individual under the First Amendment because the liberties thereunder necessarily include the guarantee that the exercise of religious belief shall not be at the cost of loss of sales, loss of wages, loss of employment and manifestations of public hostility engendered, in part at least, through the inter-action of "orthodox" public legislation and private sentiment. *American Communications Assn.* v. *Douds,* 339 U.S. 382, 392; *Watkins* v. *United States,* 354 U.S. 178, 197; *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 461. "The word 'liberty" contained in that [Fourteenth] amendment embraces not only the right of a person to be free from

physical restraint, but the right to be free in the enjoyment of all his faculties as well." *Grosjean* v. *American Press Co.*, 297 U.S. 233, 244.

It was against indirect but powerful economic discouragements of the individual's exercise of his private religious belief that the First Amendment, by the broad sweep of its language, was intended to protect. As pointed out in *Everson* v. *Board of Education*, 330 U.S. 1, 8-13, a long history of violence and varied practices and persecutions motivated the broad security of the "Virginia Bill for Religious Liberty":

> "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, *restrained, molested,* or *burthened in his body or goods, nor shall otherwise suffer* on account of his religious opinions or belief . . ." (Emphasis supplied).

And in the same case, this Court affirmed (p. 13):

> "This Court has previously recognized that the provisions of the First Amendment, in the drafting and adopting of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."

Thus, as to freedom of religion, the First Amendment contains not only the dual prohibitions against affirmative or negative state action but also inhibits any form of burden, direct or otherwise, personal or economic, on the individual dissenter. The protection is not merely against required monetary support of a particular sect; it is broadly against restraint or burden, on person or goods, direct or indirect, on account of his religious opinions or belief.

IV. The Sunday Laws Violate the Minimal Guarantee of Equality of Treatment of All Religions and Complete Neutrality on the Part of the State.

The free exercise of religion is not a privilege conferred; it is a liberty recognized and guaranteed by the First Amendment. *Murdock* v. *Pennsylvania*, 319 U.S. 105, 115. We do not contend that any religious sect has a right to set up its own censorship against obedience to laws found desirable by the legislatures of the states. There is here presented no attempt to make variant interpretations of the Bible the test of obedience or constitutional right. We do not here assert a freedom from conformity to law because of religious dogma and no civil immunity is asserted on the basis thereof. Neither do we seek to make the phrases of earlier opinions of this Court an automatic rule for decision here. We urge here merely the long-established principle that all religions must be given equal standing and treatment under the law of every state.

The Sunday laws, as applied to Saturday Sabbatarians in the cases before this Court, violate the First Amendment because, aside from any other objective, the intrinsic result and purpose of such laws is necessarily and inevitably to discourage all sects and creeds that teach Saturday must be observed as the Sabbath.

The contention of the plaintiffs in both the *Crown Kosher* case (No. 11) and the *Braunfeld* case (No. 67) is founded, in part at least, on the basic proposition: The First Amendment, whatever else its content, does, as a minimum, guarantee religious equality; *i.e.*, no religion shall either receive the preference or support of the state or incur its hostility. This does not exhaust the content of the Amendment. But only this minimal right is here invoked.

It is not necessary here to resolve or decide the question whether under the Constitution separation of Church and State is absolute,[17] or merely relative so as to permit preferred treatment for all religions by encouragement of religious instruction and cooperation with religious authorities.[18]

Even if it be assumed (without conceding) that the state may constitutionally give aid or favor to all religions, the appellants in the *Braunfeld* case (No. 67) and appellees in the *Crown Kosher* case (No. 11) are in no worse stead.

Decisive here is the requirement that as between religious sects the State must remain completely impartial.

Equality is instinct in the guarantees of the First Amendment. Madison in his "Memorial and Remonstrances" supporting Jefferson's "Bill for Establishing Religious Freedom in Virginia" stated (*Everson* v. *Board of Education*, 330 U.S. 1, 28, 64-66):

> "The Religion then of every man must be left to the conviction and conscience of every man; and

[17] In *Everson* v. *Board of Education*, 330 U.S. 1, 15, and in *McCollum* v. *Board of Education*, 333 U.S. 203, 210, it is stated and repeated: "Neither [state nor Federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another."

[18] In *United States* v. *Ballard*, 322 U.S. 78, 87 this Court stated: "The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position."

And in *Zorach* v. *Clauson*, 343 U.S. 306, 313-314: "When the state encourages religious instruction or co-operates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions."

it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right . . . [A]ll men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an '*equal* title to the free exercise of Religion according to the dictates of conscience'." [Emphasis supplied]

On June 8, 1789, Madison introduced the first proposed amendments to the Federal Constitution. The fourth and fifth of these read:

"Fourthly, that in Article 1st, section 9, between clauses 3 and 4, be inserted these clauses, to wit: The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established nor shall the *full* and *equal* rights of conscience be in any manner, or on any pretext, infringed. . . . That in Article 1st, section 10, between clauses 1 and 2, be inserted this clause, to wit: No State shall violate the *equal rights of conscience*, or the freedom of the press, or the trial by jury in criminal cases." (1 Annals of Congress, 434-435). [Emphasis supplied]

The Committee of Eleven on August 15th referred back to the House the amendment, "nor shall the *equal* rights of conscience be infringed." (*Id.* at 729) [Emphasis supplied]

In all of its decisions, this Court has exhibited complete unanimity on one point: As between sects, the First Amendment requires that the State be completely neutral and impartial. In *Terrett* v. *Taylor*, 9 Cr. 42, the Court held (p. 49):

> "But the free exercise of religion cannot be justly deemed to be restrained by aiding with *equal attention* the votaries of every sect to perform their own religious duties * * *." (Emphasis supplied).

In *Everson* v. *Board of Education*, 330 U.S. 1, 15, the Court said, and in *McCollum* v. *Board of Education*, 333 U.S. 203, 210, i.e.—emphasized:

> "Neither [a state nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance."

and in the *Everson* case, the Court added (330 U.S. 1, 18):

> "That [the First] Amendment requires the state to be a *neutral* in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

The basic emphasis on equality and impartiality was reiterated in *Zorach* v. *Clauson*, 343 U.S. 306, by statement (pp. 313-314):

> "We sponsor an attitude on the part of government that shows *no partiality* to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma . . . *The government must be neutral* when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious

> observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction." [Emphasis supplied]

And Mr. Justice Black, in dissent, (343 U.S. 306, 315), relied on the same principle, rigorously applied (p. 319):

> "Now as then, it is only by wholly isolating the state from the religious sphere and compelling it to be *completely neutral,* that the freedom of each and every denomination and of all non-believers can be maintained." [Emphasis supplied]

The uniform course of decision in this Court thus establishes that any legislative provision which directly or, as here, indirectly but effectively, gives substantial favor or preferential treatment to one group of religious sects and so strongly discourages another is violative of the First Amendment. As conceded in the dissent in *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 651:

> "If the avowed or intrinsic legislative purpose is either to promote or to discourage some religious community or creed, it is clearly within the constitutional restrictions imposed on legislatures and cannot stand."

V. As Against First Amendment Rights, the Sunday Laws Can Be Sustained Only if the Subordinating Interest of the State Is Compelling.

As stated by Mr. Justice Cardozo in *Palko* v. *Connecticut,* 302 U.S. 319, 326:

> "We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought

within the Fourteenth Amendment by a process of absorption."

"Rational connection" between the remedy provided by the State and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, is too "slender grounds" and will not suffice where, as here, the questioned legislation collides with the First Amendment absorbed into the Fourteenth. *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 639; *Thomas* v. *Collins*, 323 U.S. 516, 530.

The applicable rule has at different times been variously stated by this Court:

Clear and present danger.—State legislation that restricts any of the fundamental freedoms may be sustained only if addressed to "a clear and present danger to a substantial interest of the State" (*Cantwell* v. *Connecticut*, 310 U.S. 296, 311) or if enforced "only to prevent grave and immediate danger to interests which the state may lawfully protect" (*West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 639) or to guard against a "clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest." *Terminiello* v. *Chicago*, 337 U.S. 1, 4. "* * * [A]ny attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger." *Thomas* v. *Collins*, 323 U.S. 516, 530.

Preferred position.—The Court has reiterated that the freedoms guaranteed by the First Amendment are in a "preferred position". *Jones* v. *Opelika*, 316 U.S. 584, 600, 608 (dissenting opinion, adopted as opinion

of the court on rehearing, *per cur. Jones v. Opelika*, 319 U.S. 103); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 115; *Martin* v. *Struthers*, 319 U.S. 141, 149; *Prince* v. *Massachusetts*, 321 U.S. 158, 164; *Follett* v. *McCormick*, 321 U.S. 573, 575; *Thomas* v. *Collins*, 323 U.S. 516, 527, n. 12, 530; *Marsh* v. *Alabama*, 326 U.S. 501, 509; *Everson* v. *Board of Education*, 330 U.S. 1, 28; *Saia* v. *New York*, 334 U.S. 558, 562; *United States* v. *CIO*, 335 U.S. 106, 121, n. 21; *id.*, 129, 141 (concurring opinion); *Kovacs* v. *Cooper*, 336 U.S. 77, 88.

Even those who question the "preferred position" phrase, recognize that, as stated in *Cantwell* v. *Connecticut*, 310 U.S. 296, 310—

> "* * * in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.
>
> "The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds."

Accordingly they acknowledge that the First Amendment liberties "come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs* v. *Cooper*, 336 U.S. 77, 89, 95 (concurring opinion).

Subordinating interest of the State must be compelling.—Most recently, the stated rule is that to justify any interference with the free exercise of constitutional personal rights "the subordinating interest of

the State must be compelling." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 265 (concurring opinion); *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 463; *Barenblatt* v. *United States*, 360 U.S. 109, 127; *Bates* v. *Little Rock*, 361 U.S. 516, 524.

Whether we apply the standard of "clear and present danger," "grave and present danger," or "compelling subordinating interest" to the state legislation, does not affect the result. Whether we accord the guarantee of "free exercise of religion" a "preferred position" or merely a greater "momentum of respect," these phrases afford no formulae for mechanical jurisprudence. They all, however, do recognize that the presumption of validity ordinarily accompanying state legislation is in this field replaced by a careful weighing of the relative interests and consideration of how the one will be affected by the specific restriction, the other by its absence. In this process, the interests of the State are not solely on one side of the scales and limited to support of the Sunday laws. As stated by Mr. Justice Stone in his dissent in *Minersville School District* v. *Gobitis*, 310 U.S. 586, 607:

> "The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to that justice and moderation without which no free government can exist. For this reason it would seem that legislation which operates to repress the religious freedom of small minorities, which is admittedly within the scope of the protection of the Bill of Rights, must at least be subject to the same judicial scrutiny as legislation which we have

recently held to infringe the constitutional liberty of religious and racial minorities." (Citing *Meyer* v. *Nebraska*, 262 U. S. 390; *Pierce* v. *Society of Sisters*, 268 U. S. 510.)

In the first instance, the weighing of the conflicting interests is for the legislative body. But the fundamental precept of the First and Fourteenth Amendments is that there shall be limitations on the power of government. Whatever the legislative judgment, therefore, this Court cannot escape answering the question independently. *Schneider* v. *State*, 308 U.S. 147, 161.

VI. The Interest of the State in Sunday Laws Is Not Compelling Because Reasonable Alternative Measures Are Open to Achieve the Same Objectives Without Violation of the Constitutional Rights of the Individual.

The task of weighing the circumstances and appraising the substantiality of the reasons in support of the legislative limitation of the free enjoyment of fundamental rights is always a difficult and delicate one. *Schneider* v. *State*, 308 U.S. 147, 161; *Thomas* v. *Collins*, 323 U.S. 516, 529-530; *Breard* v. *Alexandria*, 341 U.S. 622, 644. But the mere fact of a claimed public good never justifies the imposition of restrictions on religious liberty.

As a most logical corollary to the rule that "the subordinating interest of the State must be compelling", this Court has frequently recognized that an important element in the balancing of the relative interest, is consideration of whether there exist reasonable alternative methods of effectuating the legislative policies that underlie the statute without causing harm to the fundamental rights of the individual. Clearly enunciated in *Dean Milk Co.* v. *Madison*, 340 U.S. 349,

354, the principle has many times been applied by the Court:

In *Lovell* v. *Griffin*, 303 U.S. 444, the interest of the state in maintenance of public order and the prevention of disorderly conduct and littering of streets was held inadequate to sustain city manager censorship of door-to-door distribution because the comprehensive ordinance was "not limited [as an alternative] to ways [of distribution] which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets." (p. 451).

In *Schneider* v. *State*, 308 U.S. 147, the city ordinances yielded to the individuals' constitutional freedoms because the objectives of the legislation—to prevent street litter and perpetration of fraud—could be attained by reasonable alternatives: Punishment of those actually throwing papers in the streets and denunciation and punishment of frauds and trespasses (pp. 162, 164). This, even though "these means are less efficient and convenient".

In *Thornhill* v. *Alabama*, 310 U.S. 88, the right of free speech prevailed over antipicketing legislation because the statute disregarded possible alternatives and, as the court pointed out (p. 105) it did "not aim specifically at serious encroachments on these interests [in the protection of the community from violence and breaches of the peace] and does not evidence any such care in balancing these interests against the interest of the community and that of the individual in freedom of discussion on matters of public concern."

In *Cantwell* v. *Connecticut*, 310 U.S. 296, the guarantee of free exercise of religion made void the Connecticut statute requiring a certificate (issuable in the unlimited discretion of the welfare council secretary) because the public interest invoked prevention of frauds, public safety, comfort and convenience—were, as the Court pointed out (pp. 306-307) attainable by more reasonable provisions for identification and authorization and reasonable regulation of time and manner of solicitation.

In *Martin* v. *Struthers*, 319 U.S. 141, an ordinance based on the legitimate interest of the community in protecting the householder against the nuisance of annoyance by door-to-door distributors and in the prevention of crime (*id.*, p. 144) yielded to the freedom to make distribution of religious literature because the city had obvious and reasonable alternative means—general trespass after warning ordinances and identification devices—specifically pointed out by the Court (p. 148) as permitting the problem to be worked out with due respect for the constitutional rights of the individual.

In *Saia* v. *New York*, 334 U.S. 558, the Lockport city ordinance forbidding sound amplification devices in public places except on police permit was held to violate the right of free speech. This Court said that the community interest in peace and quiet could be attained by reasonable alternatives (p. 562): "Noise can be regulated by regulating decibels. The hours and places of public discussion can be controlled. . . . Any abuses which loud-speakers create can be controlled by narrowly drawn statutes." There was hence no compelling reason to subordinate the individual's right of free speech.

In *Kunz* v. *New York*, 340 U.S. 290, an ordinance requiring police permit to hold meeting on public streets yielded to the guarantee of free speech because the legitimate interest of the city in preventing serious interference with normal usage of streets and in preventing disorder could be attained by reasonable alternative (1) Punishment if speeches result in disorder or violence; and (2) Licensing provisions setting up appropriate standards (pp. 294-295).

It is apparent that in weighing the circumstances in cases of this kind, the Court rightly attaches pivotal importance to the question whether there are available to the State means, either by reasonable alternatives or by more narrowly drawn statutes, of protecting the community interest without abridging the constitutional rights of the individual. The broad-axe approach is not permissible when the scalpel will do.

A. *General exemptions in the Sunday laws would remedy the evil at which they aim without harm to the right of religious freedom.*—The unfairly discouraging effect of the Sunday laws on sects that observe another day as a matter of religious belief is so plain that a number of States have removed the inequality while yet obtaining the basic objective of insuring that all obtain at least one day rest in seven. These grant a general exception to those whose day of religious observance is Saturday, or, more broadly, to those whose day of religious observance is other than Sunday, simply providing that the Sunday law shall not apply to them or that the fact of such observance shall constitute a defense to prosecution for violation:[19]

[19] The statutes are set forth in full in the separately bound Statute Appendix hereto. Iowa Code Ann. Sec. 729.1, also provided a similar general exemption until its repeal. 1955 (56 G.A. ch. 273, § 1.

Conn. Gen. Stat. (1958), sec. 53-303.
Indiana Ann. Stat. (Supp. 1956), sec. 10-4301.[20]
Kentucky Rev. Stat. (1959), sec. 436.160(2).
Maine Rev. Stat. Ann. c. 134 (1954), sec. 44.
Michigan Comp. Laws (1948), sec. 435.7.
Minnesota Stat. Ann. (1947), sec. 614.30.
Ohio Rev. Code Ann. (Page, 1954), sec. 3773.24.
Virginia Code Ann. (Supp. 1960), sec. 18.1-359.
West Virginia Code Ann. (Supp. 1960), sec. 6073.

Thirteen other States grant exemption from Sunday laws that are limited to labor but do not permit the opening of shops or stores. The following state statutes grant to those who observe as a day of worship Saturday or a day other than Sunday an exemption or exception which permits work or labor on Sunday but, in plain language or by judicial construction, does not exempt the keeping open of stores or shops.[21]

Illinois Ann. Stat. ch. 38, sec. 549.
Kansas Gen. Stat. Ann. (1949) sec. 21-953.
Massachusetts Gen. Laws (1957), c. 136, sec. 6.
Missouri Ann. Stat., (1949) sec. 563.700.
Nebraska Rev. Stat., sec. 28-940.
New Jersey Rev. Stat. (1953), sec. 2A:171-4.
New York Penal Law, sec. 2144.
North Dakota Rev. Code (1943) sec. 12-2117.
Oklahoma Stat. Ann. (1951) tit. 21, sec. 909.
Rhode Island Gen. Laws (1956) sec. 11-40-4.
South Dakota Code (1939) sec. 13.1710.
Texas Pen. Code Ann. (1952) Article 284.
Washington Rev. Code (Supp. 1956) sec. 9.76.020.

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[20] This exemption may not apply to sales of motor vehicles.

[21] The Statutes are set forth in full in the separately bound Statute Appendix hereto. Arkansas provides a similar partial exemption despite repeal of its comprehensive Sunday law. Ark. Stat. Ann. (1947), § 41-3806.

The general exemptions in the statutes of nine states cited above require the conclusion that there are available reasonable alternative ways in which the State may secure its legitimate interest in the health and welfare of its citizens without infringing the constitutional immunity of the Saturday Sabbatarian from economic discouragements in the free exercise of his religion.[22]

The exemptions found in the laws of the other thirteen in the second group cited above are not acceptable as alternatives because of their limited nature. They, however, together with the general exemption laws of the nine states, do constitute a rather clear rebuttal to the suggestion sometimes made that a single and uniform day of rest—Sunday—is essential to adequate detection of violations and to satisfactory enforcement of the law and substantial attainment of the peripheral social objectives of Sunday legislation.

It necessarily follows that the Sunday laws in question here do not satisfy the test most recently laid down by this Court:

> "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." (*Bates* v. *Little Rock*, 361 U. S. 516, 524.)

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[22] State legislatures are urged to be the "ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. R. Co.* v. *May*, 194 U.S. 267, 270; *United States* v. *Lovett*, 328 U.S. 303, 319 (conc. op.). Logically, this would seem to give importance as precedent to the general exemptions found in the legislation of the nine states cited above. Certainly it does not permit inference that the legislative guardians did not give consideration to the constitutional rights here urged.

Exempting statutes, however, in form, at least, savor more of toleration than recognition of constitutional right. Particularly is this true where, as in so many states (*e.g.*, Connecticut, Maine, Michigan, Virginia and West Virginia), the exemption contains a conditioning proviso that the Saturday Sabbatarian in exercising his exemption "not disturb other persons." It must also be noted that some courts have held that the presence in a Sunday law of a clause exempting as a class those who as a matter of conscientious belief observe another day for religious worship violates the equal protection requirement of the Fourteenth Amendment or of state constitutions by withholding the same exemption from others outside the specified class. *City of Shreveport* v. *Levy*, 26 La. Ann. 671; *Anonymous*, 12 Abb. N. C. 455 (N.Y. Sup. Ct. 1882); *Kislingbury* v. *City of Springfield*, 10 N.J. Misc. 798, 801, 160 A. 654 (Ct. Com. Pleas 1932). We question the correctness of these decisions. However, the question they raise makes more pertinent the other reasonable alternative obviously open to the States.

B. *One-day-rest-in-seven laws exemplify another reasonable alternative open to the States.*—The one-day-rest-in-seven law as enacted by a number of the States does not impinge on the individual's free exercise of his religion. Yet it plainly ensures to each individual the full period of rest that is the alleged objective of the so-called Sunday laws.

The Massachusetts Gen. Laws (1957), c. 149 provide:

> § 48. "Every employer of labor engaged in carrying on any manufacturing, mechanical or mercantile establishment or workshop in the commonwealth shall allow every person, except those specified in section fifty, but including watchmen

and employees maintaining fires, employed in such manufacturing, mechanical or mercantile establishment or workshop at least twenty-four consecutive hours of rest, which shall include an unbroken period comprising the hours between eight o'clock in the morning and five o'clock in the evening, in every seven consecutive days. No employer shall operate any such manufacturing, mechanical, or mercantile establishment or workshop on Sunday unless he has complied with section fifty-one. Whoever violates this section shall be punished by a fine of fifty dollars.

§ 50 A. Every person employed as a watchman in establishments other than those described in section fifty-eight, or employed in maintaining fires in such establishments, but not including janitor in resident apartment houses, shall be allowed at least twenty-four consecutive hours of rest in every seven consecutive days. No provision of any other section of this chapter shall be construed as limiting the rights given by this section. The term "watchman" as used in section forty-eight or in this section shall include guards in banks, as defined in section one of chapter one hundred and sixty-seven. An employee violating this section shall be punished by a fine of fifty dollars.

§ 51. Before operating on Sunday, every employee subject to section forty-eight or fifty A shall post in a conspicuous place on the premises a schedule containing a list of his employees who are required or allowed to work on Sunday, and designating the day of rest for each. No employee shall be required or allowed to work on the day of rest designated for him.

The California Labor Code, Div. 2, Part 2, c. 1 provides:

Sec. 510. *Days work.* Eight hours of labor constitute a day's work, unless it is otherwise expressly stipulated by the parties to a contract.

Sec. 550. *Day's Rest Defined.* As used in this chapter "day's rest" applied to all situations whether the employee is engaged by the day, week, month, or year, and whether the work performed is done in the day or night time.

Sec. 551. *One day's rest in seven.* Every person employed in any occupation of labor is entitled to one day's rest therefrom in seven.

Sec. 552. *Maximum consecutive working days.* No employer of labor shall cause his employees to work more than six days in seven.

Sec. 553. *Violation; misdemeanor.* Any person who violates this chapter is guilty of a misdemeanor.

Sec. 554. *Exemptions.* This chapter shall not apply to any cases of emergency nor to work performed in the necessary care of animals, crops or agricultural lands, nor to work performed in the protection of life or property from loss or destruction, nor to any common carriers engaged in or connected with the movement of any train. Nor shall the provisions of this chapter apply when the employer and a labor organization representing employees of such employer have entered into a valid collective bargaining agreement respecting the hours of work of such employees. Nothing in this chapter shall be construed to prevent an accumulation of days of rest when the nature of the employment reasonably requires that the employee work seven or more consecutive days, providing that in each calendar month the employee receive days of rest equivalent to one day's rest in seven.

In addition to the exceptions herein, the Chief of the Division of Labor Law Enforcement may, when in his judgment hardship will result, exempt any employer or employees from this chapter:

Sec. 555. *Applicability to cities and counties.* Sections 550, 551, 552 and 554 of this chapter are

applicable to cities which are cities and counties and to the officers and employees thereof.

Sec. 556. *Exemption for 30-hour week and six-hour day.* This chapter shall not apply to any employer or employee when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof.

Wisconsin Stat. Ann. (1957) provide:

Title 13, sec. 103.85. *One day rest in seven.*

(1) Every employer of labor, whether a person, partnership, or corporation, who owns or operates any factory or mercantile establishment in this State, shall allow every person, except those specified in sub. (2), employed in such factory or mercantile establishment, at least 24 consecutive hours of rest in every 7 consecutive days and shall not permit any such person to work for such employer during such 24 consecutive hour period, except in case of breakdown of machinery or equipment or other emergencies, requiring the immediate service of experienced and competent labor to prevent serious injury to person, damage to property, or suspension of necessary operations, when such experienced and competent labor is not otherwise immediately available. This shall not authorize any work on Sunday not now authorized by law.

* * * * * *

Many other states of course, by appropriate legislation prescribe a maximum of 48 hours per calendar week for women generally (e.g., Ariz. Rev. Stat. Ann. (1956), sec. 23-281) or for women in specified industries and trades (e.g., Wyoming Stat. Ann. (Supp. 1959), sec. 27-218) or for persons in specified industries (e.g., Ore. Rev. Stat. (1957) secs. 652.010(2), 652.020.

The all-embracing one-day-rest-in-seven law typified by the California, Massachusetts and Wisconsin enact-

ments make clear the availability to the state governments of alternative means by which to ensure adequate rest for their inhabitants in the protection of their health.

Thus, it is manifest that there is here involved no essential protection of paramount interests of the State, and no other justification that can be deemed a compelling reason for the Sunday laws as here applied. To permit the States so clearly to discourage the Saturday Sabbatarian religions is to abridge and deny free exercise of religion in the mere guise of a health regulation.

VII. The Question Here Involved Has Never Been Considered in the Light of Present Circumstances and Giving Effect to the Legal Considerations Established by This Court as Pertinent.

The brief of the appellants in No. 11 (Appellants' Br., p. 50) urges that the one-day-rest-in-seven type statute does not ensure that all employed members of a family will have the same day off for recreation or the same week-end days as their school children. These misgivings have no basis in experience. In California and Wisconsin, where there are no Sunday laws, we are aware of no complaints of dislocations under their one-day-rest-in-seven laws. The vast majority would be subject to no compulsion to change their weekly routine.

In this connection, it must be borne in mind that federal and state wage and hour legislation, coupled with labor union requirements have in large part eliminated the abuses at which Sunday laws are allegedly aimed. Current statistics show that as of July, 1960, of the non-agricultural wage and salary

workers in the United States, about 72% work 40 hours or less per week and only 13% work more than 48 hours per week. "Employment and Earnings" (U.S. Dept. of Labor) Vol. 7, No. 2 (August, 1960) p. 9 Table A-15. The same source shows that among the self-employed more than 46% work in excess of 48 hours per week, but this includes doctors, lawyers and the other professions who are not now effectively controlled by the type of Sunday law here in question.

Contrary to the suggestion of the appellants (Br., p. 50) we do not question the validity of Sunday legislation "simply because a number of members of the public, though by no means all, regard it as a day of religious obligation." Our grievance as a matter of law is that by prohibiting work or opening of shops on Sunday, the Sunday laws penalize the Saturday Sabbatarian economically, substantially impair the freedom of choice in the individual's religion, and, by the burdens so imposed, abridge the "free exercise of religion" guaranteed on an equal basis to all. As against the basic freedom here involved, it is submitted that the State's make-weight arguments for uniformity are *de minimis* and cannot be given controlling effect. In any event, this line of argument was answered in *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 640-642:

> "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."

* * * * * * * * *

> Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great.

The appellants suggest (Brief, p. 73) that the argument based on the economic discouragements of Saturday worship resulting from the Sunday closing laws has been rejected in six State Supreme Courts. Analyzed, these decisions constitute but little precedent for decision of the question here.

In Alabama, *Frolickstein* v. *Mobile*, 40 Ala. 725 (1867) was decided long before the First Amendment was recognized as absorbed into the Fourteenth. No discussion of the precise issue appears therein. In Arkansas, in *Scales* v. *State*, 47 Ark. 476, 483, 1 S.W. 769 (1886), the Court merely adopted the language of *Commonwealth* v. *Has*, 122 Mass. 40 (1877), which goes on the ground that there is no direct impairment of the rights of those sects, that worship on another day. In *Re Berman*, 344 Mich. 598, 75 N.W. 2d 8 (1956), the defendant failed to bring himself within the provision of the Detroit City Ordinance excepting from its operation "any person who conscientiously believes that the seventh day of the week should be observed as the Sabbath and actually refrains from such secular business and/or labor on that day." He owned three stores, only one of which he closed on Saturday. In *Komen* v. *City of St. Louis*, 316 Mo. 9, 289 S.W. 838 (1926), the only cited Missouri case in

which the religious liberty point was raised, the Court relied on the *Hennington* and *Petit* cases which, of course, involve no religious liberty question.

People v. *Friedman*, 302 N.Y. 75, 96 N.E. 2d 184 (1950), dismissed 341 U.S. 907 (1951), on this precise point merely stated that the law does not "work a restriction upon the exercise of religion according to the dictates of one's conscience."

In *Specht* v. *Commonwealth*, 8 Pa. St. 312 (1848), the Court justified the Sunday law, in part at least, on the ground (p. 323): "In a Christian community where a very large majority of the people celebrate the first day of the week as their chosen period of rest from labor, it is not surprising that that day should have received the legislative sanction. . . ." The decision gives no consideration to the realities of the economic burden imposed saying (p. 324):

> "* * * nor is there any hindrance offered to the full enjoyment of it [the religious belief]."

In the *Specht* case, the reference to "a Christian community" and to the rule of the "large majority of the people," found also in numerous other State decisions, is reminiscent of reliance in Spain on the fact that Catholicism is the religion of the majority as a justification for vigorous ban on missionary work by other sects. In any event, the Court in *West Virginia Board of Education* v. *Barnett*, 319 U.S. 624, conclusively disposed of this ground, saying (p. 638):

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.

> One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

It is submitted that the Sunday laws here involved can be sustained only if this Court blinds itself to the realities of the economic discouragements they necessary visit on the Saturday Sabbatarians. These are no less weighty—certainly they are less speculative—than the indirect discouragements for the Negro that invalidated the laws in *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, and *Bates* v. *Little Rock*, 361 U.S. 516. As in *Speiser* v. *Randall*, 357 U.S. 513, 518, the deterrent effect is the same as if the State were to fine them for worshipping on Saturday.

CONCLUSION

The Seventh-day Adventist Denomination does not seek to secularize Sunday or to deprive others of their equal right to the free exercise of their religions. It here makes no plea for purely commercial interests that entertain no religious scruple and purely for gain would contest the interest, or deny the power, of the State to assure to all a periodic surcease from labor or business activity.

It is our position that, even if we assume validity of friendliness of the State to religion, all religions can be helped by furthering an atmosphere of good will among those of different faiths and that the interests of religion generally suffer when, as here, State law substantially impairs freedom of choice and liberty of conduct in the free exercise of religious belief—not

inconsistent with the health, or safety of the State or its people or offensive to their moral standards.

The wording of the First Amendment is simple and the opinions of this Court in First Amendment cases have been broad and assuring as to the free exercise of religion. Members of the Denomination, including students and thousands in other lands, await with hope decision of the vital issues in the cases now before the Court.

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APPENDIX A

"Lord's Day."—Ga. Code Ann. (1935), § 26-6905, 26-6914; Me. Rev. Stat. Ann. (1954) ch. 134, §§ 38, 43; Maryland Ann. Code (1957) art. 27, § 492; N. H. Rev. Stat. Ann. (1955) §§ 578:4; 578:6; Pa. Stat. Ann. (1945) tit. 18, § 4699.4.

"Sabbath Day."—Ga. Code Ann. (1935) §§ 26-6903, 26-6908, 26-6910; Minn. Stat. Ann. (1947) § 614.29, 614.30; Neb. Rev. Stat. (1956) § 15-258; N. D. Rev. Code (Supp. 1957) § 12-2115; Wash. Rev. Code (1956) § 9.76.030; W. Va. Code Ann. (1955) § 6072, § 6073 (Supp. 1959).

"Christian Sabbath."—N. J. Rev. Stat. (1953) as amended (Supp. 1959), § 2A:171-1.

"Worldly employment."—N. J. Rev. Stat. (1953) as amended (Supp. 1959), § 2A:171-1; Pa. Stat. Ann. (1945) tit. 18, § 4699.

"Worldly activity."—Del. Code Ann. (1953) as amended, § 906(c) (Supp. 1958).

"Secular business."—Conn. Gen. Stat. § 53-300 (Supp. 1959); Me. Rev. Stat. Ann. (1954) ch. 134, § 43; Mich. Comp. Laws (1948) § 435.2; Vt. Stat. (1958) § 3301.

"Secular calling."—N. H. Rev. Stat. Ann. (1955) § 578.3.

"Secular work."—Va. Code Ann. § 18.1-359 (Supp. 1960); W. Va. Code Ann. § 6073 (Supp. 1959).

"Sabbath breaking."—Ind. Ann. Stat. (1956) § 10-4301; Minn. Stat. Ann. (1947) §§ 614.28; Mo. Ann. Stat. (1949) § 563.690; N. Y. Pen. Law § 2142; N. D. Rev. Code (Supp. 1957) § 12-2115; Okla. Stat. Ann. (1958) tit. 21 §§ 907, 908, 911.

"[P]rofane the Lord's day."—Md. Ann. Code (1957) art. 27, § 492.

"[D]esecration of the Sabbath day."—Neb. Rev. Stat. (1956) §§ 15-258, 16-226, 17-128; Wyo. Comp. Stat. Ann. (1957) § 15-160 (Eleventh).

"Violating" or "violations of the Sabbath."—Ga. Code Ann. (1935), § 26-6905; Miss. Code Ann. (1956) § 2368.

"[H]oly time."—N. Y. Pen. Law § 2144; Okla. Stat. Ann. (1958) tit. 21, § 909; S. D. Code (1939) § 13.1710.

APPENDIX B

"This practice of many Christians is not based upon biblical authority. Very early in its history the Christian church began the practice of celebrating its belief in the resurrection of Jesus Christ on the first day of the week." Carlyle Adams, "Our Religions", Washington *Evening Star*, Section A, p. 8, col 2, May 21, 1960.

"There are in the New Testament no commands, no prescriptions, no rules, no liturgies applying to the observance of the Lord's day." W. O. Carver, *Sabbath Observance* (Broadman Press, Nashville, Tennessee, 1940), p. 52. (Mr. Carver was professor of Comparative Religion and Missions at the Southern Baptist Theological Seminary, Louisville, Kentucky.)

"There is no definite command for this commemoration in the New Testament, and we do not know just when or where it began," *The Sunday School Magazine*, p. 166 (Methodist Publishing House, Nashville, Tenn., March, 1929).

"It will not be found in Scripture where Saturday is discharged to be kept, or turned into the Sunday; wherefore it must be the Church's authority that changed the one and instituted the other; therefore my opinion is, that those who will not keep this feast [Easter] may as well return to the observation of Saturday, and refuse the weekly Sunday." Charles II, quoted in Robert Cox,

Sabbath Laws and Sabbath Duties (Maclachlan & Stewart, Edinburgh, 1853), p. 333.

"[I]t is quite clear that however rigidly or devoutly we may spend Sunday, we are not keeping the Sabbath. . . . The Sabbath was founded on a specific, Divine command. We can plead no such command for the obligation to observe Sunday. . . . There is not a single sentence in the New Testament to suggest that we incur any penalty by violating the supposed sanctity of Sunday." R. W. Dale, *The Ten Commandments* (George H. Doran Co., New York, n.d.), pp. 104-106.

"But you may read the Bible from Genesis to Revelation, and you will not find a single line authorizing the sanctification of Sunday. The Scriptures enforce the religious observance of Saturday, a day which we never sanctify." James Cardinal Gibbons, *The Faith of Our Fathers*, 87th rev. ed. (J. Murphy & Co., Baltimore, 1917), p. 89.

"If we consulted the Bible only, we should still have to keep holy the Sabbath Day, that is, Saturday . . ." John Laux, *A Course in Religion for Catholic High Schools and Academies*, Part I (Benziger Brothers, New York, 1934) p. 51.

"Nowhere in the Bible is it stated that worship should be changed from Saturday to Sunday. The fact is that the Church was in existence for several centuries before the Bible was given to the world. The Church made the Bible, the Bible did not make the Church." Martin J. Scott, *Things Catholics are Asked About* (P. J. Kenedy & Sons, New York, 1927), p. 136.

"It is in the *tradition* of the Christian church that we find definite *authority* for applying the prescriptions of the Third Commandment [Prot. Fourth Commandment] to our Sunday. Hence, those of our countrymen who claim to guide themselves by 'the Bible only' and who reject ecclesiastical *tradition* unless backed by unmistakable Bibli-

cal testimonies should by rights subscribe their names to that somewhat obscure sect known as 'Sabbatarians,' who, as Bible Christians, more logically retain the old day of rest and occasionally get into trouble with the police when caught employing labor on Sundays. Moreover, the Bible Protestant has no 'warranty in Scripture' for convicting of sin those who, to his way of thinking, profane the sacredness of *Sunday.*'" F. M. De Zulueta, S. J. *Letters on Christian Doctrine,* First Series. 10th & rev. ed., (Burns, Oates & Washbourne, Ltd., London, 1919) Vol. 1, p. 145.

APPENDIX C

"He changeth the tymes and lawes that any of the sixe worke dayes commanded of God will make them unholy and idle dayes when he lyste, or of their owne holy dayes abolished make worke dayes agen, or when they changed ye Saterday into Sondaye. . . . They have changed God's lawes and turned them into their owne tradicions to be kept above God's precepts." *Exposicion of Daniel the Prophete,* Gathered out of Philipp Melanchton, Johan Ecolampadius, by George Joye, 1545, p. 119. (British Museum Library).

"The papacy has attempted to change the law of God. The . . . fourth commandment has been so changed as to authorize the observance of the first instead of the seventh day as the Sabbath. . . . An intentional, deliberate change is presented: 'He shall *think* to change the times and the law.' The change in the fourth commandment exactly fulfills the prophecy. For this the only authority claimed is that of the church. Here the papal power openly sets itself above God." Ellen G. White, *The Great Controversy* Pacific Press Publishing Association, Mountain View, California, 1950), p. 446.

APPENDIX D

"Ques.—Which is the Sabbath day?

Ans.—Saturday is the Sabbath day.

Ques.—Why do we observe Sunday instead of Saturday?

Ans.—We observe Sunday instead of Saturday because the Catholic Church transferred the solemnity from Saturday to Sunday."—Peter Geiermann, *The Convert's Catechism of Catholic Doctrine* (St. Louis, Mo., 1910) p. 50.

"Finally at the last opening on the 18th of January, 1563, their last scruple was laid aside. The Archbishop of Reggio made a speech in which he openly declared that tradition stood above the Scriptures. The authority of the Church could therefore no longer be bound to the authority of the Scriptures—because the Church had changed the Sabbath into Sunday—not by the command of Christ, but by its own authority." H. J. Holtzmann, *Canon and Tradition*, p. 263.

"They [the Catholics] allege the change of the Sabbath into the Lord's Day, contrary, as it seemeth, to the Decalogue; and they have no example more in their mouths than the change of the Sabbath. They will needs have the Church's power to be very great, because it hath dispensed with a precept of the Decalogue." Philip Schaff, *The Creeds of Christendom*, Vol. 3 (Harper & Brothers, New York, 1905), p. 64.

"Q. How prove you that the [Roman Catholic] Church hath power to command feasts and holydays?

"A. By the very act of changing the sabbath into *Sunday*, which Protestants allow of; and therefore they fondly contradict themselves, by keeping *Sunday* strictly, and breaking most other feasts commanded by the same church." Henry Tuberville, *An Abridgment of the Christian Doctrine* (J. B. Kirker, New York, 1860), p. 58

APPENDIX E

Ellen G. White, the early leader of the Seventh-day Adventist denomination, says in her book *The Great Controversy* (1950):

> "Royal edicts, general councils, and church ordinances sustained by secular power were the steps by which the pagan festival attained its position of honor in the Christian world. p. 574.
>
> "Yet this very class [of religious teachers who refuse to recognize the seventh-day Sabbath enjoined by the Fourth Commandment] put forth the claim that the fast-spreading corruption is largely attributable to the desecration of the so-called 'Christian sabbath,' and that the enforcement of Sunday observance would greatly improve the morals of society. This claim is especially urged in America, where the doctrine of the true Sabbath has been most widely preached. . . . The leaders of the Sunday movement may advocate reforms which the people need, principles which are in harmony with the Bible; yet while there is with these a requirement which is contrary to God's law, His servants cannot unite with them. Nothing can justify them in setting aside the commandments of God for the precepts of men." pp. 587-588.
>
> "And then the great deceiver [Satan] will persuade men that those who serve God are causing these evils. The class that have provoked the displeasure of Heaven will charge all their troubles upon those whose obedience to God's commandments is a perpetual reproof to transgressors. It will be declared that men are offending God by the violation of the Sunday-sabbath; that this sin has brought calamities which will not cease until Sunday observance shall be strictly enforced; and that those who present the claims of the fourth commandment, thus destroying reverence for Sunday, are troublers of the people, preventing their restoration to divine favor and temporal prosperity." p. 590.
>
> "They will lament the great wickedness in the world and second the testimony of religious teachers that the degraded state of morals is caused by desecration of

Sunday. Great will be the indignation excited against all who refuse to accept their testimony." p. 591.

"Those who honor the Bible Sabbath will be denounced as enemies of law and order, as breaking down the moral restraints of society, causing anarchy and corruption, and calling down the judgments of God upon the earth. Their conscientious scruples will be pronounced obstinacy, stubbornness, and contempt of authority. They will be accused of disaffection toward the government. Ministers who deny the obligation of the divine law will present from the pulpit the duty of yielding obedience to the civil authorities as ordained of God. In legislative halls and courts of justice, commandment keepers will be misrepresented and condemned. A false coloring will be given to their words; the worst construction will be put upon their motives.

"As the Protestant churches reject the clear, Scriptural arguments in defense of God's law, they will long to silence those whose faith they cannot overthrow by the Bible. Though they blind their own eyes to the fact, they are now adopting a course which will lead to the persecution of those who conscientiously refuse to do what the rest of the Christian world are doing, and acknowledge the claims of the papal sabbath. . . . Liberty of conscience, which has cost so great a sacrifice, will no longer be respected. In the soon-coming conflict we shall see exemplified the prophet's words: 'The dragon was wroth with the woman, and went to make war with the remnant of her seed, which keep the commandments of God, and have the testimony of Jesus Christ.' Revelation 12:17." p. 592.